

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of)
)
Application by Qwest Communications)
International, Inc., for Provision)
Of In- Region, InterLATA) **WC Docket No. 02-148**
Services in Colorado, Idaho, Iowa,)
Nebraska and North Dakota)

SUPPLEMENTAL COMMENTS
OF THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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DATED: August 28, 2002

On August 21, 2002, the Federal Communications Commission (“FCC” or “the Commission”) issued a Public Notice requesting comment on a Qwest Corporation’s (Qwest) *ex parte* filing made on August 20, 2002, in WC Docket No. 02-148. The Colorado Public Utilities Commission (COPUC) takes this opportunity to comment, once again, on the concerns swirling around the so-called “secret” agreements.

The COPUC persists in urging the Commission to approve the § 271 application of Qwest. On a going-forward basis, Qwest has established that it has taken steps to address the concern by making the agreements transparent and available. On a looking-backward basis, enforcement actions are the appropriate means to remediate alleged violations of the Telecommunications Act of 1996 (Act). The only “remedy” advocated by opponents of the Qwest application is inaction and delay by this Commission. The COPUC strenuously objects to such a result. There is no reason to deprive Colorado citizens of the benefits of increased long distance and local exchange competition that will be spurred by Qwest’s entry into the long distance market. This is particularly so if that decision is based on the amorphous assertions of “harm” that permeate this proceeding. The Commission should approve the application and permit Qwest to enter the long distance market.

The Qwest *ex parte* filing, which was attached to the Public Notice, outlines Qwest’s plan to file with state commissions certain negotiated, but previously unfiled, agreements; to post those filed-but-not-yet-approved agreements on its website; and to make the terms of those agreements immediately available in the respective states *prior to* the relevant state commission’s approval of the filed agreements. The *ex parte* also states that the previously unfiled agreements will be filed with the relevant state commissions pursuant to § 252(e)(2), contains certain reservation of rights by Qwest, and specifies the types of unfiled agreements

which Qwest will not file with the state commissions. The information in the August 20 *ex parte* filing supplements the information previously supplied by Qwest in its reply comments filed in this docket.

The COPUC views Qwest's *ex parte* filing as interesting and notes that, in Colorado at least, Qwest has followed through on its promise to file previously-unfiled agreements. On August 21 and 22, 2002, Qwest filed with the COPUC 11 applications for approval of interconnection agreement amendments. Each application contains one or more agreements with a single Competitive Local Exchange Carrier (CLEC) authorized to provide service in Colorado. All told, Qwest submitted approximately 16 agreements for COPUC review and approval.¹ The COPUC will consider each application and each agreement in due course.²

While the COPUC finds Qwest's actions commendable and intends to consider the filed agreements, we are concerned that the Commission may stall consideration of, or reject outright, Qwest's application for approval to offer in-region interLATA services in Colorado due to the tempest in a teapot commonly referred to as the "secret agreements." For the reasons discussed in our evaluation filed on July 2, 2002,³ and in our reply comments filed on July 29, 2002,⁴ the COPUC urges this Commission not to be sidetracked by the unfiled agreements issue. We believe that the interests of the consumers of Colorado are best served by the prompt approval of Qwest's application and by Qwest's entry into the in-region, interLATA market.

¹ Only one of the five unfiled agreements offered into evidence in the COPUC's *en banc* workshop was filed by Qwest in August, 2002. That one agreement is the Covad agreement dated April 19, 2000 (Exhibit 6). Based on the Qwest August 20 *ex parte* filing at page 3, it appears that Qwest has determined that the other four agreements in the Colorado record "do not contain provisions that relate to Section 251(b) or (c) or contain provisions relating to Section 251 that have been terminated or superseded by agreement, commission order, or otherwise."

² With respect to each agreement, the first issue that the COPUC will address is: is this an interconnection agreement within the scope of § 252(a) of the Act? If the answer is yes, the COPUC will then consider the factors set out in § 252(e)(2) of the Act.

³ See generally *COPUC Evaluation* at pages 39-41 and 63-65.

Based on our evaluation of the evidence presented during our investigation into Qwest's compliance with § 271 of the Act, on our recognition that there is no remedy available in the § 271 context, and on our determination that the problem can -- and will -- be addressed through a separate investigation and, if appropriate, enforcement action aimed specifically at the unfiled "secret" agreement issue, we found that Qwest had met the requirements of § 271. We urge the Commission to make the same finding on the record presented and not to surrender to the application opponents' tactics of obfuscation.

Factual record before the COPUC. To provide a context, COPUC recounts briefly the record before it concerning unfiled "secret" agreements.

On May 7-9, 2002, the COPUC held a § 271 *en banc* workshop on, *inter alia*, the public interest. At the workshop, AT&T Communications of the Mountain States, Inc. (AT&T) presented five unfiled agreements for the COPUC's consideration. These agreements are the only unfiled agreements in the Colorado § 271 record.⁵ Each agreement was at issue in the complaint case in Minnesota.⁶

Despite having the opportunity to present witnesses on the topic of the impact of the unfiled agreements, neither AT&T nor any other CLEC elected to present witness testimony to inform the COPUC of the harm to competition or of the discrimination which resulted or may have resulted from the unfiled "secret" agreements. Similarly, Qwest presented no witnesses concerning the unfiled "secret" agreements.

⁴ See generally *COPUC Reply Comments* at pages 36-37 and 44-46.

⁵ The agreements are found in the record at *Qwest Application*, App. K, Vol. 1, Tab 1375 (Exhibit 2), Tab 1376 (Exh. 3), Tab 1377 (Exhibit 4), Tab 1378 (Exhibit 5), and Tab 1379 (Exhibit 6).

⁶ This is the complaint proceeding brought by the Minnesota Department of Commerce in which the issue of the unfiled "secret" agreements was first litigated. Of note here, as stated by counsel for AT&T, the remedies sought in that proceeding were fines and penalties. See *Qwest Application*, App. K, Vol. 1, Tab 1373, at page 130.

The only presentations on the topic were legal argument and surmise, liberally mixed with heavy doses of hearsay concerning testimony offered in the Minnesota complaint proceeding, made by counsel for AT&T and by counsel for Qwest.⁷ These presentations were unavailing and unenlightening. The simplest and most obvious factual matters were left open. For example, counsel could not tell the COPUC whether the five agreements were in effect or had ever been in effect.⁸ In addition, there was no evidence or representation that any of the submitted unfiled agreements were applicable to Colorado. Further, it appears that at least one of the unfiled agreements contained provisions that were less stringent than, or the same as, the metrics of the Performance Indicator Definitions used to measure Qwest's performance.⁹ Moreover, the agreements presented as exhibits in Colorado covered the period February 2000 through July 2001; and there was no evidence that, at the present time, Qwest is entering into negotiated agreements and not filing them. To the contrary, Qwest asserted that it had taken steps to assure that negotiated agreements with future effects (forward-looking agreements) are submitted to the relevant state commission for approval.

In short, while the COPUC had undisputed evidence that unfiled agreements existed, there was no *evidence* whatsoever that addressed the impact, if any, of the unfiled "secret"

⁷ See, e.g., transcript of COPUC *en banc* workshop in Docket No. 97I-198T held on May 7, 2002, *Qwest Application*, App. K, Vol. 1, Tab 1373, at pages 111-53; transcript of COPUC *en banc* workshop in Docket No. 97I-198T held on May 8, 2002, *Qwest Application*, App. K, Vol. 1, Tab 1380, at pages 21-44, 47-55, 63-65.

⁸ See, e.g., transcript of COPUC *en banc* workshop in Docket No. 97I-198T held on May 7, 2002, *Qwest Application*, App. K, Vol. 1, Tab 1373, at page 146 (presentation by Gary Witt, counsel for AT&T); transcript of COPUC *en banc* workshop in Docket No. 97I-198T held on May 8, 2002, *Qwest Application*, App. K, Vol. 1, Tab 1380, at pages 112-13 (statements of Todd Lundy, counsel for Qwest).

⁹ See transcript of COPUC *en banc* workshop in Docket No. 97I-198T held on May 8, 2002, *Qwest Application*, App. K, Vol. 1, Tab 1380, at pages 109-12 (statements of Todd Lundy, counsel for Qwest).

agreements either on individual CLECs or on competition in Colorado. Thus, the COPUC found that the record evidence did not warrant an adverse recommendation on Qwest's application.¹⁰

This determination is supported by the absence of remedies, in the § 271 context, for this past behavior.

Absence of § 271-related remedies. As a preliminary matter, it is undisputed that there is no existing statute, case law, or regulation that defines what an interconnection agreement is or the scope of § 252(a) of the Act. Given the absence of clearly defined terms, we agree with the Commission that, "simply as a matter of statutory construction, few of the substantive obligations contained in the local competition provisions of sections 251 and 252 are altogether self-executing; they rely for their content on the Commission's rules."¹¹ As the Commission has not opined on the definition of interconnection agreement in this context,¹² and given the information now available to us, the COPUC does not believe the CLEC-asserted violations of the Act arising from Qwest's failure to file the "secret" agreements for state commission approval rises to the level of *per se* statutory violations.¹³

Assuming, *arguendo*, that there is a past violation of the statute, the COPUC determined that there is no § 271-related remedy other than delaying consideration of (or rejecting outright)

¹⁰ This determination is consistent with the guidance provided by this Commission: "[W]e will not withhold section 271 authorization on the basis of isolated instances of allegedly unfair dealing or discrimination under the Act. In this instance we do not find that the various incidents cited by commenters constitute a pattern of discriminatory conduct that undermines our confidence that [the applicant's] local market is open to competition and will remain so after [the applicant] receives interLATA authority." *BANY Order* at para. 444 (footnotes omitted).

¹¹ *SBC Kansas/Oklahoma Order* at para. 19.

¹² The scope of the § 252(a) filing requirement is the precise subject of the petition for declaratory ruling filed by Qwest and now pending before the Commission.

¹³ By this statement, the COPUC does not intend to prejudge -- and has not prejudged -- any issue that may come before it in an enforcement action or in proceedings to review interconnection agreements. The facts developed in each proceeding will determine the outcome.

the Qwest § 271 application.¹⁴ The COPUC rejected this “remedy” because delay serves no discernible public interest purpose. Delay will actively and affirmatively disserve the public interest by postponing (and perhaps denying altogether), for no apparent reason, the competitive benefits to Colorado consumers from Qwest’s entry into the long distance market.¹⁵

In addition, denial of an application or delay of the Qwest application for the purpose of conducting non-specific state proceedings would raise a plethora of questions and issues.¹⁶ First, to provide guidance to the state commissions and to Qwest, the Commission would need to identify precisely the special circumstances which require rejection, or delay in consideration, of Qwest’s application.¹⁷ Second, the Commission would need to provide guidance defining what behavior (and the quantum of that behavior) is “bad” enough to warrant delay or denial of an application. Third, the Commission would need to provide guidance concerning how recent the bad behavior needs to be to warrant delay or denial. Fourth, the Commission would need to provide guidance concerning the circumstances in which Qwest’s statement of corrective actions (either already taken or to be taken) is insufficient. Fifth, the Commission would need to provide

¹⁴ When given the opportunity to do so, counsel for AT&T could not offer a § 271-related remedy other than delay of consideration of Qwest’s application. In addition, he could not articulate why Qwest’s allegedly violative behavior could not be addressed through a separate enforcement action. *See generally* transcript of COPUC *en banc* workshop in Docket No. 97I-198T held on May 7, 2002, *Qwest Application*, App. K, Vol. 1, Tab 1373, at pages 129-45 (colloquy between COPUC Chairman Gifford and counsel for AT&T).

¹⁵ *Section 271 Compliance Order* at pages 26-31; *see also Motion to Modify Volume 7 Order*, *Qwest Application*, App. C, Vol. 1, Tab 31.1, at pages 12-13 (discussion of the benefits to consumer welfare of adding Qwest as a competitor in the long distance market).

¹⁶ The identified issues are the most obvious ones. The list is illustrative and not exhaustive.

¹⁷ In this regard, the COPUC notes that the logical result of the CLEC argument is this: every time a RBOC violates an interconnection agreement, that RBOC action violates or implicates § 251 of the Act. If it adopts this position, the Commission has two options: it can determine that any violation warrants denial or delay of a § 271 application, or it can determine that some leeway is tolerable. If the Commission determines that perfection cannot be achieved so that some leeway is tolerable, then the Commission must provide guidance to the state commissions and the RBOCs with respect to how much leeway will be tolerated and with respect to how to make that determination.

guidance concerning the actions that Qwest would need to take, or the period of time that would need to pass, to “cure” the past bad acts or bad behavior.¹⁸

Further, denial or delay pending state commission review of the “secret” agreements serves no purpose on a going-forward basis, particularly now that Qwest has agreed to file -- and has filed -- the agreements with the relevant state commissions.

If the state commission determines that the “secret” agreement is an interconnection agreement and approves it, CLECs are free to pick and choose provisions from that agreement. There is no discrimination on a going-forward basis. If the state commission determines that the “secret” agreement is not an interconnection agreement, then by definition there is and has been no discrimination in a § 271 sense. If the state commission determines that the “secret” agreement is an interconnection agreement and rejects it pursuant to § 252(e)(2)(A) of the Act, then it never would have been available for pick and choose and, by definition, there is and has been no discrimination in a § 271 sense.¹⁹

¹⁸ Of course, the guidance would apply to all future § 271 applications, not just to Qwest.

¹⁹ Following its review of the unfilled “secret” agreements offered into evidence during its § 271 investigation, the COPUC is aware of at least two types of provisions within those “secret” agreements that the COPUC would likely have disapproved. First, there are provisions which appear to be discounts from the TELRIC-based wholesale rates established by the COPUC in its pricing proceedings (Dockets No. 96S-331T and No. 99A-577T). The COPUC would be hard-pressed to approve such a provision because the discounted rates would be non-TELRIC and, thus, would not be just, reasonable, and cost-based. Second, there are provisions which provide for reciprocal compensation for internet service provider (ISP)-bound traffic. Again, we likely would not approve such a provision. The COPUC has addressed this precise issue in three litigated arbitrations and has determined that bill and keep, not reciprocal compensation, is the appropriate method for ISP-bound traffic. See COPUC Decisions No. C00-479 (May 5, 2000) and No. C00-685 (June 23, 2000) in Docket No. 00B-011T; Decisions No. C00-858 (Aug. 7, 2000) and No. C00-1071 (Sept. 27, 2000) in Docket No. 00B-103T; and Decisions No. C01-312 (March 30, 2001) and No. C01-477 (May 7, 2001) in Docket No. 00B-601T. The COPUC makes these observations based on the information available to it as a result of its review of the “secret” agreements offered during the § 271 *en banc* workshop held in May, 2002. The COPUC has not prejudged any matter that may come before it. We will reach our decision in each individual proceeding based on the evidence presented in that proceeding.

Availability of enforcement actions. Qwest's promised actions, if taken,²⁰ will eliminate concerns about *future* actions, essentially eliminating unfiled "secret" agreements of the type at issue here. This does not address the entire issue, as opponents of the application are quick to point out. The fact that, in the past, Qwest may have violated the law remains an issue to be addressed. In our opinion, the proper forum to take up this "past bad acts" (backward-looking) aspect of the "secret" agreement issue is in a state commission or Commission investigation/enforcement action.

COPUC has initiated such an investigation. Beginning in mid-February, 2002, based primarily on reports of the Minnesota complaint proceeding, COPUC staff began an investigation into the existence of unfiled "secret" agreements in Colorado. To date, COPUC staff has reviewed and analyzed over 100 documents provided by Qwest and CLECs in response to staff audit requests for documents which may be unfiled interconnection agreements or amendments. COPUC staff concluded its preliminary review in July, 2002. Irrespective of the outcome of this Qwest § 271 application docket, we anticipate our staff investigation will continue apace.

At the conclusion of its review and analysis, COPUC staff will decide whether or not to request that the COPUC pursue formal action. If a COPUC show cause order should issue, a proceeding will commence. At the conclusion of that proceeding, if the allegations of improper conduct are proven, appropriate remedial actions will be taken.²¹

²⁰ The COPUC is aware of no reason to assume that Qwest will not fulfill its commitments with respect to filing interconnection agreements and amendments in the future. Certainly, the application opponents have provided no evidence to support a contrary conclusion.

²¹ If the agreement is found to be an interconnection agreement which should have been filed for COPUC review and approval, *both parties* to the agreement likely will face remedial action. For example, with respect to the CLEC party, gains and benefits derived from the favorable discriminatory treatment may need to be disgorged. Of course, the appropriate remedy will depend on the facts established during each enforcement proceeding.

This investigation/enforcement process is the correct -- and long-standing -- regulatory mechanism to use to address *past* behavior. No application opponent has articulated a convincing -- or, really, any -- reason to conclude that this tried-and-true procedure will not suffice in this instance. Given the existence of adequate enforcement processes to address past behavior and Qwest's commitments and actions designed to address its future behavior, as well as the absence of § 271-related remedies, the COPUC found that the unfiled "secret" agreements did not warrant a finding that Qwest's entry into the in-region interLATA market was not in the public interest. We urge this Commission to reach the same result and to approve the Qwest § 271 application without further delay.

Be assured, the COPUC does not take lightly allegations that Qwest may have violated §§ 251 or 252 of the Act. However, based on the investigation that is already well underway here and our review of voluminous documents possibly falling within the ambit of an interconnection agreement, we are convinced that there is much less here than the alarmist rhetoric that has been raised in opposition to this application might lead the Commission to believe. Our preliminary investigation has not revealed scads of unfiled agreements with interconnection agreement-like terms; rather, the troublesome documents amount to a handful. This suggests, then, not a systematic attempt by Qwest to discriminate between CLECs to some obscure anticompetitive end, but instead more mundane, run-of-the-mill carelessness and

oversight.²² Carelessness and oversights do not, to be sure, relieve Qwest of its obligations under § 251 and § 252. Nonetheless, it casts the failure to file what may or may not amount to interconnection agreements for approval under § 252 in a different light than would be the case if Qwest appeared to be not filing agreements for some anticompetitive purpose.

In conclusion, the COPUC asks this Commission to recall, and to follow, its own admonition with respect to new interpretive disputes (such as the unfiled “secret” agreement controversy) in the context of § 271 applications:

As the Commission stated in the *SWBT Texas Order*, despite the comprehensiveness of our local competition rules, there will inevitably be, in any section 271 proceeding, new and unresolved interpretive disputes about the precise content of an incumbent LEC’s obligations to its competitors -- disputes that our rules have not yet addressed and that do not involve *per se* violations of self-executing requirements of the Act. The section 271 process simply could not function as Congress intended if we were generally required to resolve all such disputes as a precondition to granting a section 271 application. Congress designed section 271 proceedings as highly specialized, 90-day proceedings for examining the performance of a particular carrier in a particular State at a particular time. Such fast-track, narrowly focused adjudications are often inappropriate forums for the considered resolution of industry-wide local competition questions of general applicability. Second, such a requirement would undermine the congressional intent of section 271 to give the BOCs an incentive to open their local markets to competition. That incentive would largely vanish if a BOC’s opponents could effectively doom any section 271 application by raising a host of novel interpretive disputes in their comments and demanding that authorization be denied unless each one of those disputes is resolved in the BOC’s favor. Finally, simply as a matter of statutory construction, few

²² Qwest’s anticompetitive purpose in not filing these agreements remains a question that application opponents do not satisfactorily answer. The oft-alleged motivation -- to buy silence in the § 271 application proceeding -- does not hold as a universal term across the unfiled agreements. If Qwest sought to accomplish some larger anticompetitive purpose beyond § 271 silence, it is difficult to comprehend what that would be. Granting incrementally preferential terms to certain CLECs, but not to others, if done with far-seeing penetration such that Qwest advantaged the relatively less-efficient carriers while burdening the more efficient carriers with “normal” approved terms, could, we suppose, end up advantaging Qwest. This would be because the unfiled, preferential terms granted to the less efficient firms would keep the less efficient firms in the market and systematically disadvantage relatively more efficient firms, presumably, if the discrimination were severe enough, so that the more efficient firms would exit the market. This accomplished, according to the scheme, Qwest could then be left to compete with less efficient firms. Of course, Qwest would also need to be able to erect barriers to prevent new entry into the market. If such a theory of anticompetitive harm seems far-fetched, that is because it is.

of the substantive obligations contained in the local competition provisions of sections 251 and 252 are altogether self-executing; they rely for their content on the Commission's rules.²³

The simple truth of the matter is that the § 271 application process is not conducive to resolution of the unfiled "secret" agreement brouhaha. There are other, more effective procedures available to, and being used by, state commissions to address this issue as necessary and appropriate in each state.

The § 271 process is a broad, public policy driven undertaking. Its sweep is enormous, taking years to complete and a great deal of labor by the ILEC, CLECs, and state commissions. By the nature of its sweep, there will be blemishes in the record. This is one such blemish, but it should not be fatal to the application as a whole. The COPUC and the Qwest Regional Oversight Committee (ROC) have striven over two years to give the Commission a complete, rigorous, exacting § 271 record. In connection with that goal, the ROC performed the most rigorous OSS test yet performed on an ILEC in the country. Qwest substantially passed this test. The COPUC developed the most rigorous performance assurance plan yet implemented by an ILEC. The COPUC, with the ROC, Qwest and CLECs, developed the most comprehensive SGAT yet filed by an ILEC. The COPUC reset TELRIC rates for Colorado, which rates have benchmarked the entire Qwest region.

At the end of the day, in light of all these notable market-opening accomplishments, it would be a grave error to deny or delay granting § 271 authority because of a trifle such as the unfiled agreements -- and a trifle, no less, that is being dealt with through § 252 transparency and an enforcement investigation.

²³ *SBC Kansas/Oklahoma Order* at para. 19 (footnotes omitted).

The Commission should grant the Qwest § 271 application without further delay.

(S E A L)



ATTEST: A TRUE COPY

Bruce N. Smith
Director

Respectfully submitted,

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

RAYMOND L. GIFFORD

Chairman

POLLY PAGE

Commissioner

JIM DYER

Commissioner

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COPUC Orders	
<i>Motion to Modify Volume 7 Order</i>	Decision No. R02-516-I, <i>Order Denying Motion to Modify Order on Staff Volume VII</i> , Docket No. 97I-198T (Mailed Date May 3, 2002).
<i>Section 271 Compliance Order</i>	Decision No. C02-718, <i>Commission Decision Regarding OSS, Section 272, Public Interest, Track A, Change Management Process, and Data Reconciliation and Commission Decision Regarding the Commission's Recommendation to the Federal Communications Commission Concerning Qwest Corporation's Compliance with Section 271</i> , Docket No. 02M-260T (Mailed Date June 26, 2002).
FCC Orders	
<i>BANY Order</i>	<i>In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York</i> , CC Docket No. 99-295, Memorandum Opinion and Order, FCC 99-404 (rel. Dec. 22, 1999).
<i>SBC Kansas/Oklahoma Order</i>	<i>In the Matter of Joint Application by SBC Communications, et al, for Provision of In-Region, InterLATA Services in Kansas and Oklahoma</i> , CC Docket No. 00-217, Memorandum Opinion and Order, FCC 01-29 (rel. Jan. 22, 2001).
Qwest Application and Related Materials	
<i>Qwest Application</i>	Brief of Qwest Communications International Inc. in Support of Consolidated Application for Authority to Provide In-Region, InterLATA Services in Colorado, Idaho, Iowa, Nebraska and North Dakota, <i>In the Matter of Qwest Communications International Inc. Consolidated Application for Authority to Provide In-Region, InterLATA Services in Colorado, Idaho, Iowa, Nebraska and North Dakota</i> , WC Docket No. 02-148 (June 13, 2002).
<i>COPUC Evaluation</i>	<i>In the Matter of Application by Qwest Communications International, Inc., for Provision of In-Region, InterLATA Services in Colorado, Idaho, Iowa, Nebraska, and North Dakota</i> , WC Docket No. 02-148, Evaluation of the Colorado Public Utilities Commission (July 2, 2002)

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COPUC Orders	
<i>COPUC Reply Comments</i>	<i>In the Matter of Application by Qwest Communications International, Inc., for Provision of In-Region, InterLATA Services in Colorado, Idaho, Iowa, Nebraska, and North Dakota, WC Docket No. 02-148, Reply Comments of the Colorado Public Utilities Commission (July 29, 2002)</i>